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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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June 11, 1996

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned docket.[1] As the principal industry association for competitive providers of telecommunications services, CompTel supports the adoption of rules to establish reasonable restrictions on all telecommunications carriers' use of customer proprietary network information ("CPNI"). CompTel believes that the unique position of the incumbent LECs ("ILECs"), however, requires protections on the use of CPNI associated with ILEC subscribers over and above those requirements which apply to all telecommunications carriers.

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1 FCC 96-221 (rel. May 17, 1996) (hereinafter "*Notice*").

I. INTRODUCTION AND SUMMARY

All telecommunications carriers are in possession of information concerning their own customers' usage of telecommunications services. This information can be a valuable resource in identifying customers who may want certain telecommunications services, but it also reveals highly personal information about the customer, such as the telephone numbers the subscriber called and the frequency of such calls. Accordingly, the Commission has traditionally taken into account both considerations of customer privacy and competitive equity in developing rules that apply to the use of CPNI.[2] Congress, in enacting new Section 222 continued this tradition.

Prior to the passage of the Telecommunications Act of 1996 ("1996 Act"), the Commission determined that usage of this data presented regulatory issues only with respect to the Bell Operating Companies ("BOCs"), GTE, and AT&T. The Commission adopted restrictions on the use these carriers may make of CPNI in response to the potential that they may use such access to gain an anticompetitive advantage in competitive markets, such as enhanced services, and also to protect legitimate customer expectations of privacy. The 1996 Act broadens the scope of CPNI protection by, for the first time, enacting rules that apply to the use of CPNI by all telecommunications carriers. Section 222 of the Act imposes a duty upon all carriers to protect the privacy of customer information, to use such information for

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[2] *See, e.g., Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 223 (1988); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7605-14 (1991); *see, Notice* at ¶ 4.

its own marketing purposes only with customer authorization, and to disclose CPNI to any person only upon written authorization from the customer.

At the same time, however, Congress left undisturbed the Commission's ability to prescribe additional rules to certain carriers or classes of carriers when such rules are consistent with customer privacy and competitive equity. Nothing in Section 222 limits the Commission's authority under other provisions of the Communications Act to address access to CPNI. Moreover, the Act does not replace the Commission's prior rules governing use of CPNI by the BOCs. Instead, Section 222 is an additional obligation applicable to carriers.

In these comments, CompTel recommends that the Commission implement Section 222 by establishing the minimum level of protection all carriers must afford to CPNI. Section 222 requires prior customer approval for a carrier to use CPNI to cross-market services, but does not limit a carrier's ability to use CPNI to offer a customer alternative packages of services it already receives, such as a volume discount plan. CompTel supports a requirement that carriers obtain the prior written approval of a customer before accessing CPNI for cross-marketing purposes.

These baseline requirements are insufficient, however, to address the customer privacy and competitive concerns raised by CPNI that an ILEC receives as a result of its incumbent status. Due to the monopoly context in which ILECs first obtained access to these customers' CPNI and the importance of the ILEC's network in the development of local exchange competition, additional safeguards are necessary to properly balance privacy and competitive equity in this instance. Accordingly, CompTel urges the Commission to adopt additional rules which apply to the use of CPNI associated with ILEC subscribers.

II. SECTION 222 ESTABLISHES THE MINIMUM LEVEL OF PROTECTION ALL TELECOMMUNICATIONS CARRIERS MUST PROVIDE FOR THEIR CUSTOMERS' CPNI

By its terms, Section 222 governs the usage of CPNI by all telecommunications carriers. Its provisions establish the minimum steps all carriers must take to protect against the impermissible use of CPNI. In particular, Section 222 addresses the situations in which approval is necessary for a carrier or a third party to access CPNI, and establishes the form such approval must take.

A. When Customer Approval is Necessary to Use CPNI

Section 222(c)(1) states:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose or permit access to individually identifiable [CPNI] in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service . . .

This provision establishes a default rule requiring customer approval for use of CPNI. Approval is not required, however, when CPNI is used to provide "the telecommunications service" the customer ordered or services "necessary to, or used in" the provision of that service, or in the situations described in Section 222(d)(3).

CompTel disagrees with U S West's claim (*Notice*, ¶ 20) that Section 222 permits a carrier to use CPNI to market any telecommunications service the carrier may wish to offer. The statute is clear that "except . . . with the approval of the customer" a carrier *may only* use, disclose, or permit access to CPNI for purposes relating to the

telecommunications service from which the data is derived and services necessary to or used in such service. U S West's interpretation would completely reverse Section 222's default rule, allowing access for nearly all purposes without approval. The Commission, therefore, is correct in concluding that a close reading of Section 222 does not support U S West's interpretation.[3]

Conversely, an overly narrow interpretation of Section 222's use of the term "telecommunications service" is inappropriate. CompTel agrees with the Commission that Congress intended to prevent the use of CPNI to cross-market different services without customer approval.[4] The Commission should not sacrifice a carrier's ability to provide service to its customers and to offer enhancements to those services. However, the Commission's proposal to use "traditional service distinctions" to differentiate permissible from impermissible cross-marketing is problematic. At a time when these traditional service distinctions rapidly are becoming blurred by new service offerings comprising elements of several previously distinct categories, the Commission's proposed regime could quickly become outdated. Moreover, the proposal would appear to require the classification of future services into only one of these service classifications. As carriers increasingly develop integrated service offerings, it will become ever more difficult to classify the service as one or the other of the historical service categories, and disputes concerning whether a carrier has permissibly accessed CPNI would likely increase as a result.

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3 *Notice*, at ¶ 20.

4 *Notice*, at ¶ 21.

If, despite these inherent limitations, the Commission nonetheless decides to use these traditional service distinctions, it should do so for no more than a brief interim period. If local service competition begins to develop -- as CompTel hopes it will -- the Commission must not be saddled with an outdated regulatory regime. It therefore should commit to reexamining the standard at a specific future date, in order to assess whether the distinction remains useful.

Finally, the Commission must adopt rules implementing the exceptions contained in Section 222(d) without undercutting the applicability of Section 222(c)(1). In particular, the Commission should narrowly interpret the inbound telemarketing exception described in Section 222(d)(3). This exception should apply only when *both* the inbound call and the discussion of other telecommunications services were initiated by the customer. Carriers should not be permitted to use a customer's call to the carrier as an excuse to solicit approvals for CPNI access. In addition, the Commission should strictly limit CPNI access to the duration of the inbound call. Use of CPNI for any other purpose -- including follow up contacts -- must meet the requirements of Section 222(c)(1).

B. What Type of Approval is Necessary

As noted above, Section 222(c)(1) requires "the approval of the customer" to make use of CPNI for purposes other than are specified in that provision. CompTel believes that the structure of Section 222 requires that any approval to use CPNI be in writing from the customer.

The central provision of Section 222 is subsection (c)(1), which limits the purposes for which a carrier may "use, disclose, or permit access to" CPNI without the

customer's approval. The content of that approval is dictated by Section 222(c)(2), which requires affirmative written request in order for the disclosure of CPNI "to any person." Significantly, this section is not limited to disclosure to third-parties. Rather, it governs disclosure "to any person designated by the customer." This would include not only third-parties but also the carrier itself. Accordingly, CompTel supports requiring written approval for carriers to obtain access to CPNI for marketing purposes.[5]

In addition, this structure makes no distinction between the approval requirements for a carrier and for third-party access to CPNI. That is, a third-party seeking access to customer CPNI should not be required to meet any more stringent requirements to demonstrate customer approval than the carrier itself must meet. A symmetrical approval requirement also has the benefit of minimizing a carrier's ability to gain an advantage over its competitors by imposing unreasonable standards of proof to demonstrate customer approval.

In response to the Commission's questions at paragraph 33 of the *Notice*, CompTel believes a customer's written authorization to access CPNI should remain effective until it is revoked by the customer. Once a customer has taken an affirmative action to give consent to the carrier's use of CPNI, it is reasonable to presume the customer continues to consent to such usage unless and until the customer requests restriction on his or her CPNI. Further, CompTel does not believe it is necessary at this time to limit the number of attempts

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[5] As the *Notice* recognizes, Section 222(d)(3) lends support to this interpretation. Approval under Section 222(d)(3), by its nature, must be oral. However, because oral verification is more difficult to verify and is more susceptible to misunderstanding, approval under Section 222(d)(3) is limited to calls initiated by the customer and, even then, approval expires at the conclusion of the call. Approval situations under Section 222(c)(1) do not contain either of these limitations, and a higher standard should apply.

a carrier may make to obtain customer approval to access CPNI. Customers are quite capable of disciplining carriers who bombard them with nuisance requests, particularly when that carrier operates in a competitive market. Finally, a carrier should be required to observe any limitations or conditions the customer places on its approval for a carrier to access the customer's CPNI.

III. THE COMMISSION SHOULD ADOPT ADDITIONAL REQUIREMENTS APPLICABLE TO THE CPNI OF ILEC SUBSCRIBERS

As the Commission notes, "nothing in the 1996 Act affects" the Commission's existing CPNI requirements.[6] In addition, nothing in the Act affects the Commission's authority under other provisions of the Communications Act to adopt rules necessary to carry out its public interest obligations. For example, Section 275(d) imposes additional restrictions on a LEC's use of certain data which also might be classified as CPNI.[7] There is nothing in the statute to suggest that both the obligations of Section 222 and of Section 275(d) do not apply independently of each other. Thus, the Commission has the authority (and in the case of Section 275(d), the obligation) to prescribe additional rules governing CPNI if such action is consistent with the Commission's Communications Act obligations.

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[6] *Notice* at ¶ 3. For this reason, CompTel supports the continued application of the Commission's prior CPNI rules to the BOCs. Those rules were adopted as part of a series of safeguards designed to protect against access discrimination and other anticompetitive activities by the BOCs in the context of integrated BOC service offerings. The passage of Section 222 does not affect the Commission's prior determination that CPNI rules for the BOCs are in the public interest.

[7] 47 U.S.C. § 275(d) (prohibiting LECs from using information concerning "the occurrence or contents of calls received by providers of alarm monitoring services").

One area where additional rules are necessary is CPNI associated with subscribers to the incumbent local exchange carrier in a region. Access to this data raises different considerations of privacy and competitive equity due to the historical context in which the ILEC gained the carrier-customer relationship. First, privacy considerations are affected by the fact that in nearly all instances, ILECs acquired these customers when they were legally-protected monopoly providers of local services. Under these circumstances, customers cannot be said to have voluntarily entered into a carrier-customer relationship with ILECs. Unlike carrier-customer relationships in competitive telecommunications markets, there is no reason to give special weight to the fact that a subscriber has chosen to have a relationship with the ILEC since at the time the relationship was established the customer did not have an effective choice.

Second, the competitive considerations raised by ILEC subscribers' CPNI are significant. The ILECs acquired their substantial base of subscribers -- and consequently, a very valuable CPNI resource -- solely because they were the monopoly carrier at the time. No other carrier had an effective opportunity to obtain this CPNI. Moreover, because the ILECs' facilities are an essential bottleneck through which all but a tiny percentage of calls must pass, ILEC CPNI contains information on every use the customer makes of the public switched network, including use of interexchange and enhanced services. It therefore is much more valuable for marketing purposes than any other carrier's CPNI. If an ILEC could use this CPNI without additional restrictions, it could gain an unfair advantage over competitors both in local services and in new businesses which the ILECs might enter.

In order to address these concerns, the Commission should establish additional obligations applicable to the CPNI of ILEC subscribers. These obligations should include, at a minimum, the following:

First, if the Commission uses its traditional service classifications to determine approval requirements, an ILEC should be permitted to use CPNI only to market other local services, not to market interexchange services. The CPNI of ILEC subscribers contains information about all calls made by the customer, including interexchange calls. Access to this information without the customer's approval would confer an unjustified and anticompetitive advantage upon the ILECs in the marketing of interexchange services. ILECs should therefore be required to obtain prior written approval of a customer before accessing CPNI for purposes of marketing interexchange services.

Second, the Commission must address situations where a CLEC provides service to a customer through the resale of ILEC services or through the use of unbundled network elements obtained from the ILEC. In these contexts, the carrier-customer relationship is between the end user and the resale carrier, but the CPNI information itself may be generated by and reside in the ILEC's facilities.[8] The Commission should clarify that in this situation, the resale carrier has CPNI obligations to the customer, and the ILEC is governed by Section 222(b) in its use of that CPNI. That is, for CPNI purposes, the ILEC is a third-party given access to CPNI by the resale carrier. It may use that information only for purposes of providing the underlying service to the resale carrier; it "shall not use

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[8] This always will be true in cases of service resale pursuant to Section 251(c)(4), and also is likely to be true under Section 251(c)(3) if the resale carrier purchases switching functions from an ILEC.

such information for its own marketing efforts."[9] Furthermore, the ILEC has no right to restrict the resale carrier from accessing this CPNI as if the CPNI resided in the resale carrier's records. It may not, for example, require the resale carrier to demonstrate that it has the end user's consent to access such information, nor may the ILEC inquire as to the purposes for which the resale carrier intends to use the data.

To address these concerns, the Commission should prohibit ILECs from restricting in any way a resale carrier's access to its own customers' CPNI. The Commission also should require ILECs to develop procedures to ensure that ILEC personnel with marketing responsibilities will not have access to this CPNI. The ILECs should be required to submit descriptions of these procedures for approval to the Common Carrier Bureau, and violations of such procedures should be actionable by the resale carrier involved.

Third, the Commission should require ILECs to provide notification of customers' CPNI rights. Because such CPNI is so competitively valuable, the Commission must take steps to ensure that customers are aware of their rights and knowingly exercise those rights when they permit or deny access to CPNI. At a minimum, such notifications must inform subscribers both of their rights to protect their CPNI and also to authorize disclosure of such CPNI to third-parties. The content of such notifications should be reviewed and approved by the FCC in order to ensure it is accurate and competitively neutral. ILECs should be required to notify their subscribers at regular intervals, at least as often as once every year, over the next four years as local competition is introduced.

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[9] 47 U.S.C. § 222(b).

CONCLUSION

For the foregoing reasons, CompTel urges the Commission to adopt a written authorization requirement for carriers' access to CPNI for cross-marketing purposes. Such authorization requirements should apply equally to the carrier and to third parties requesting access to individual customer CPNI. In addition to these requirements, the Commission should take additional steps to address the privacy and competitive equity considerations applicable in the context of access to ILEC subscriber CPNI.

Respectfully submitted,

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